UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

CHERYL DOUGHERTY, individually and on behalf of all others similarly situated,

Plaintiff

v. **Civil Action No. 2:09-443**

RAMONA CERRA, individually; JOHN COOK, individually; GREG GARRETT, individually; ROLAND RICH, individually; GEORGE M. EDWARDS, individually; CLARENCE BURDETTE, individually; LUTHER COPE, individually; and all other Presently Unknown Individual Agents/Employees/Contract Workers/Representatives of VALIC/AIG, as named below, involved in the sale and marketing of VALIC/AIG retirement products in West Virginia to existing and newly hired members of the West Virginia Teachers' Retirement System; AMERICAN INTERNATIONAL GROUP, INC., a Texas corporation; AIG RETIREMENT GROUP, formerly known as AIG Valic Group; VARIABLE ANNUITY LIFE INSURANCE COMPANY, a Texas corporation; AIG RETIREMENT ADVISORS, INC., a Texas corporation formerly known as Valic Financial Advisors, Inc.; AIG RETIREMENT SERVICES COMPANY, a Texas corporation formerly known as Valic Retirement Services Company; VARIABLE ANNUITY MARKETING COMPANY, a Texas corporation; and the WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD, a West Virginia state Agency,

Defendants

MEMORANDUM OPINION AND ORDER

Pending is plaintiff's motion to remand filed June 25, 2009.

I.

Plaintiff is a public school teacher in Marshall County and a member of the state's retirement system. (3d Am. Compl. ¶ 12). Prior to 1991, public school employees participated in a pension plan called the Teacher Retirement System ("TRS"), being a Defined Benefit Plan ("DBP"). (Def. Resp. Mot. Remand 2). In the school year 1990-91, defendant Cerra visited the elementary school where plaintiff worked and spoke with her and other public school employees about their pension plans. (3d Am. Compl. ¶ 2; Pl.'s Rep. to Def.'s Resp. 2). Specifically, plaintiff alleges that the employees were led to believe that Cerra was a representative of defendant West Virginia Consolidated Public Retirement Board ("the Board"); that the TRS was in danger and would not pay promised retirement benefits; that an alternative pension plan, the Defined Contribution Plan ("DCP"), administered by the Board, would pay retirement benefits and would perform better than the TRS; that transferring to the DCP was in the best

interest of the employees; and that an immediate decision regarding switching funds was required. (3d Am. Compl. ¶ 5; Def. Resp. Mot. Remand 3, 6-7; Pl.'s Rep. to Def.'s Resp. 2).

Under the DCP, participants are able to manage their own retirement savings by selecting from one or more of a variety of approved investment options including Board-specified plans for each stocks, bonds, money market accounts, a guaranteed investment fund, and a fixed annuity offered by the Variable Annuity Life Insurance Company Annuity ("VALIC Annuity") administered by the AIG/VALIC defendants.[1] (Def. Resp. Mot. Remand 5; 3d Amd. Compl. ¶ 14). These options, along with other information on the DCP, were set forth in various explanatory

[1] A Defined Contribution Plan is an alternative retirement system to the Defined Benefit Plan. In a Defined Benefit Plan, the employer and employee each contribute a percentage of the employee's salary, and upon retirement, the employee receives a defined benefit, or a guaranteed specific dollar amount based on the employee's age, years of service and salary. In a Defined Contribution Plan, the employee and employer each contribute a percent of the employee's salary, but the employee has investment options and he can distribute the assets in his retirement account among the options in 20% increments. Upon retiring, the employee gets back what he has contributed to his account over the years and the money he has made from his investments. In other words, in a Defined Benefit Plan, the benefit is determined by a formula, but in a Defined Contribution Plan, the benefit depends on the employee's investments. See Def. Resp. Mot. Remand 2-5; West Virginia Consolidated Public Retirement Board Home Page, "Teachers' Retirement System", "Teachers' Defined Contribution," www.wvretirement.com.

documents sent to DCP participants. (Def. Resp. Mot. Remand 7). Plaintiff alleges that Cerra was actually a representative of the AIG/VALIC defendants, and received a commission for convincing public school employees to switch from the TRS to the DCP and exercise their option to purchase the VALIC Annuity. (3d Amd. Compl. ¶ 15). As a result of Cerra's misrepresentations, plaintiff claims that she transferred her entire retirement fund account from the TRS to the DCP, and specifically to the fixed VALIC Annuity in 1992. (Pl.'s Rep. to Def.'s Resp. 2).

In 2008, DCP participants were given the option to transfer back to the TRS if at least 65 percent of DCP members elected to transfer. (Pl.'s Rep. to Def.'s Resp. 2). At that time, the Board provided statements of DCP members' retirement benefits. (Pl.'s Rep. to Def.'s Resp. 2). Upon receiving her statement in April 2008, plaintiff learned that, contrary to Cerra's representations, her retirement account fared much worse under the DCP's fixed VALIC Annuity than it would have had she stayed in the TRS. (Pl.'s Rep. to Def.'s Resp. 2-3).

On May 12, 2008, plaintiff instituted this class action in the Circuit Court of Marshall County on behalf of those individuals who transferred their retirement funds from the TRS to the VALIC Annuity in the DCP after relying on Cerra's

representations. (3d Am. Compl. ¶ 12). On July 18, 2008, plaintiff amended her complaint to include the Board and eleven additional individual AIG/VALIC representatives. (Amd. Compl. 1). Thereafter, the case was transferred to the Circuit Court of Kanawha County. (Pl.'s Rep. to Def.'s Resp. 3). On March 26, 2009, plaintiff moved for leave to file the second amended complaint that added 27 new claims linking the poor performance of the DCP's VALIC Annuity to the AIG/VALIC defendants' alleged engagement in high risk securities activities, such as credit default swaps, that led to the financial crisis and government bailout of AIG in 2008. (2d Am. Compl. ¶¶ 14-37; Pl.'s Rep. to Def.'s Resp. 3).

Defendants removed on April 24, 2009, within 30 days of plaintiff moving for leave to file the second amended complaint, citing the new allegations of securities fraud as grounds for removal under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). (Not. Removal ¶¶ 6, 12). After filing the second amended complaint, plaintiff reconsidered the 27 new claims and concluded that the difficulties in litigating them were unjustifiable. (Pl. Mem. Supp. Mot. Remand 2). On June 25, 2009, plaintiff filed the third amended complaint withdrawing the 27 new claims from the second amended complaint, and omitting ten

of the individual AIG/VALIC representatives added in the seconded amended complaint. The first and third amended complaints are essentially identical.

On June 25, 2009, plaintiff moved to remand, alleging that the SLUSA claims, upon which the case was removed, had been withdrawn by the filing of the third amended complaint. Plaintiff asserts that the remaining claims arise under state law, and that principles of economy, convenience, fairness and comity warrant remand. (Pl. Mem. Supp. Mot. Remand 1). Defendants Cerra, Cook, Garrett, Edwards, Burdette, Rich, Cope, VALIC, AIG Retirement Advisors, and AIG Retirement Services Company (the AIG/VALIC defendants) responded in opposition to remand on September 11, 2009.

II.

In general, if federal district courts possess original jurisdiction over a civil action commenced in state court, the action "may be removed by the defendant or the defendants." 28 U.S.C. § 1441(a). Federal question jurisdiction is one form of original jurisdiction. It exists over "all civil actions arising under the Constitution, laws, or treaties of the

United States." 28 U.S.C. § 1331. "Congress gave federal-question jurisdiction to district courts under 28 U.S.C. § 1331 to hear 'only those cases in which a well-pleaded complaint establishes either [1] that federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997). In determining whether a claim "arises under" federal law courts apply the well-pleaded complaint rule, pursuant to which "courts ordinarily . . . look no further than the plaintiff's [properly pleaded] complaint in determining whether a lawsuit raises issues of federal law capable of creating federal-question jurisdiction." Pinney v. Nokia, Inc., 402 F.3d 430, 442 (4th Cir. 2005) (internal quotation marks omitted). "[A]ctions in which defendants merely claim a substantive federal defense to a state-law claim do not raise a federal question." In re Blackwater Sec. Consulting, LLC, 460 F.3d 576, 584 (4th Cir. 2006) (citing Louisville & N. R. Co. v. Mottley, 211 U.S. 149, 152 (1908)). The well-pleaded complaint rule "makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar v. Williams, 483 U.S. 386, 392 (1987).

The party seeking removal bears the burden of establishing federal jurisdiction. See Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994); In re Blackwater, 460 F.3d at 584. Because removal jurisdiction implicates significant federalism concerns, it is strictly construed. See Mulcahey, 29 F.3d at 151. If federal jurisdiction is doubtful, the case must be remanded. See id.; Palisades Collections LLC v. AT&T Mobility LLC, 552 F.3d 327, 336 (4th Cir. 2008).

III.

Defendants oppose remand, asserting that 1) the second amended complaint, and not the third amended complaint, is the operative pleading for remand purposes; 2) SLUSA vests federal courts with exclusive jurisdiction to entertain plaintiff's claims; and 3) the principles of policy, comity, fairness and judicial economy dictate that the court retain jurisdiction over this case.[2]

[2] Defendants combine the first and second contentions under the single argument heading "The Court Should Deny Dougherty's Motion to Remand Because SLUSA Mandates That Her Case Be Heard Only in Federal Court."

A. Federal Subject Matter Jurisdiction

1. The Operative Pleading for Remand Purposes

In opposing remand, defendants urge the court to examine the complaint as it existed at the time of removal, i.e., the second amended complaint with the 27 securities fraud allegations included. They cite Pullman Co. v. Jenkins, 305 U.S. 534 (1939), Pinney v. Nokia, Inc., 402 F.3d 430 (4th Cir. 2005), and Brown v. Eastern States Corp., 181 F.2d 26 (4th Cir. 1950) in support. In Pullman, the Supreme Court concluded that the plaintiff's second amended complaint should not have been considered in determining whether removal based on the first amended complaint was proper. Pullman, 305 U.S. at 537. Our court of appeals in Pinney reversed the district court's denial of remand and cited Pullman in holding that, where the district court allowed the plaintiffs to amend their complaints after it had already denied their motion to remand, the original complaints, rather than the complaints amended after remand, were the operative pleadings. Id. at 443. In Brown, the court of appeals held that where an original complaint asserted federal law and was properly removed, the plaintiff could not then amend the complaint to eliminate the federal question in an effort to

remand the case. Brown, 181 F.2d at 28-29.

These opinions must be read in light of subsequent Supreme Court decisions and other decisions of our court of appeals. For example, in Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988), the Court concluded that the decision to retain jurisdiction over a case when the federal question has fallen away is a discretionary one. The decision in Cohill reflects that an amendment abandoning federal claims may warrant remand. Id. at 346, 357; see also Lontz v. Tharp, 413 F.3d 435, 440 (4th Cir. 2005). Additionally, in Harless v. CSX Hotels, Inc., 389 F.3d 444 (4th Cir. 2004), where plaintiff amended her complaint after removal to eliminate references to the preemptive federal law, our court of appeals concluded that the decision to remand a case after an amendment eliminating federal claims is "within the discretion of the trial court . . .." Id. at 448. The Harless court noted that while it was clear the plaintiff was trying to avoid federal court, she had other good faith reasons for the amendment that were sufficient to warrant the district court's discretion on the question of remand. Id. at 448.

Like the plaintiff in Harless, one reason for Dougherty's third amended complaint may have arisen from a desire to avoid the federal forum. Harless, 389 F.3d at 448. However,

as plaintiff sets forth in her motion to remand, she also had "substantive and meritorious reasons" for eliminating the claims in that the difficulties posed by litigating them were too great to justify going forward with the SLUSA claims. See id. Based upon these considerations and those that follow, the operative pleading for remand purposes is the third amended complaint.

2. SLUSA's Limitations and Removal Provision

Before SLUSA, Congress passed the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §§ 77z-1, 78u-4, in 1995, which created heightened pleading requirements for private securities fraud claims in efforts to avoid frivolous lawsuits, or strike suits, filed by plaintiffs to encourage settlements from corporate entities. See Teachers' Retirement System of LA v. Hunter, 477 F.3d 162, 171-72 (4th Cir. 2007). Plaintiffs were able to avoid the stringent requirements of the PSLRA, however, by filing their claims in state court. H.R. Conf. Rep. 105-803 (1998).

In response, Congress enacted SLUSA, which amended the 1933 and 1934 Securities Acts to limit class actions filed in state court. The 1933 Act was amended in part as follows:

> **(b) CLASS ACTION LIMITATIONS.--No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging–**
>
> > **(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or**
> >
> > **(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.**
>
> **(c) REMOVAL OF COVERED CLASS ACTIONS.--Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).**

15 U.S.C. § 77p(b), 77p(c).[3]

According to the statutory definition,

A Security is a covered security if such security is --

> **A. listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities);**
>
> **B. listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing**

---

[3] **SLUSA also amends the 1934 Act with essentially identical language. See 15 U.S.C. § 78bb. All references to § 77p herein incorporate references to § 78bb's identical language.**

> standards applicable to securities described in subparagraph (A); or
>
> C. is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).
>
> . . .
>
> [Or] if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940.

15 U.S.C. § 78bb(5)(E); 15 U.S.C. § 77r(b)(1)-(2). Additionally, the instrument must fall under the above statutory definition "at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred." 15 U.S.C. § 78bb(5)(E).

The VALIC Annuity at issue is conceded to be a fixed annuity. (Not. of Removal ¶ 18). Without regard to whether this suit is a "covered class action" under § 77p(c), the VALIC Annuity here is not a "covered security," under the foregoing definition. The Supreme Court has held that a variable annuity is classified as a security and therefore is a "covered security" under the SLUSA definition. SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 79-80 (1959). Fixed annuities, on the other hand, do not share the same risk characteristics and have not been found to be "covered" under SLUSA. See Winne v. Equitable

Life Assurance Society of U.S., 315 F.Supp.2d 404, 411-13 (S.D. N.Y. 2003) (finding plaintiff's investment was a "covered security" when he transferred his account from a fixed annuity to a variable annuity). The VALIC Annuity is classified as a fixed annuity option. (Def.'s Resp. to Mot. Remand Ex. B). Moreover, the AIG/VALIC defendants agree in their Notice of Removal that the fixed annuity offered to the plaintiff is not a security. (Not. of Removal ¶ 18).

It is clear from the complaint that plaintiff is alleging defendants committed fraud and made misstatements in order to induce plaintiff and her class to transfer their retirement accounts and purchase the VALIC Annuity. (3d Am. Compl. ¶¶ 22, 42, 46, 53). However, plaintiff makes no mention of other registered securities she and her fellow class members might have chosen as investment options available to them by participating in the DCP. Defendants nevertheless contend that plaintiff's allegations infer that the fraud and misstatements were necessarily made "in connection with" these other types of registered, and hence "covered," securities, as required by SLUSA. 15 U.S.C. § 77p(b).

As noted above, other investment options were available in the DCP, but plaintiff only complains of being induced to

purchase the VALIC Annuity, making the other investment options irrelevant, despite the fact that she may have exercised her option to invest in other instruments or plans while participating in the DCP. Defendants assert that the misrepresentations plaintiff allege concern the DCP generally, and therefore are also necessarily "in connection with" other registered securities included in the DCP. (Def. Resp. Mot. Remand 17). However, the AIG/VALIC defendants apparently have no relationship with the other investment options, registered or not, in the DCP. There is no reason that the AIG/VALIC defendants would have fraudulently induced plaintiff to transfer to the DCP so she would invest in options other than the VALIC Annuity, nor has plaintiff alleged as much.

Defendants rely on caselaw elucidating the "in connection with" requirement in support of their argument that other registered securities available within the DCP fall within the ambit of plaintiff's allegations. Our court of appeals' recent decision in SEC v. Pirate Investor, LLC, 580 F.3d 233, (4th Cir. 2009) illustrates why that assertion must fail. In Pirate Investor, the court set out the following factors for consideration in determining whether the "in connection with" requirement has been satisfied:

> 1) whether a securities sale was necessary to the completion of the fraudulent scheme;
>
> 2) whether the parties' relationship was such that it would necessarily involve trading in securities;
>
> 3) whether the defendant intended to induce a securities transaction; and
>
> 4) whether material misrepresentations were "disseminated to the public in a medium upon which a reasonable investor would rely."

Id. at 244-45 (citations omitted).

First, in this case, a securities sale was not necessary to complete the allegedly fraudulent scheme because plaintiff had the option of only purchasing the VALIC Annuity. Similarly, as to the second factor, transferring to the DCP would not necessarily involve trading in registered securities. Third, plaintiff alleges that the AIG/VALIC defendants' intent in their misrepresentations was to sell the VALIC Annuity by way of transfer to the DCP. Finally, the misrepresentations were made to a specific class of people in a private setting, and not the investing public. See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 841, 862 (2d Cir. 1968) (the investing public was misled when defendant corporation issued a deceptive press release).

Although the Pirate Investor factors are not mandatory requirements in determining whether the "in connection with"

requirement has been met, they are guiding in the inquiry. As the above discussion of the factors demonstrates, there is no evidence that supports the conclusion that the fraud of which plaintiff complains occurred in connection with the purchase or sale of a covered security. The fraud alleged by plaintiff in this case solely deals with the fixed VALIC Annuity, which is not a covered security. Further, plaintiff had the clear option of only purchasing the VALIC non-covered security, which is likely the option the AIG/VALIC defendants were marketing. Inasmuch as there is no covered security that was a necessary, or even an incidental, component to the fraud alleged in plaintiff's complaint, the "in connection with" requirement is not satisfied. Accordingly, this case does not fall within the ambit of SLUSA, or, more particularly, its removal provision.[4]

---

[4] Defendants also make passing reference to complete preemption in their response to plaintiff's motion to remand. ("Therefore, SLUSA completely preempts state law based, private class actions alleging fraud or manipulation touching on the purchase or sale of securities." (Resp. Mot. Remand at 13)). This appears to be an inartful or misguided reference to the complete preemption doctrine, as SLUSA's removal provision provides an explicit statutory basis for removal rather than necessitating reliance on the narrow complete preemption doctrine. See Kircher v. Putnam Funds Trust, 547 U.S. 633, 636 n. 1 (2006) ("[SLUSA's] preclusion provision is often called a preemption provision; the Act, however, does not itself displace state law with federal law but makes some state-law claims nonactionable through the class-action device in federal as well as state court.").

Moreover, defendants' effort to premise removability on presumed securities in the DCP other than the fixed VALIC Annuities is in any event unavailing. The defendants timely removed this case within 30 days of learning of plaintiff's second amended complaint, namely, the pleading that included the 27 claims of securities fraud against the VALIC/AIG defendants. As noted, the third amended complaint is essentially identical to the first amended complaint, withdrawing those 27 new claims found only in the second amended complaint. It would appear futile for defendants to argue that in the absence of plaintiff's 27 claims that made the case removable, the plaintiff's remaining claims still assert a federal question. If plaintiff's first amended complaint contained claims rendering the action removable, defendants were required to file a notice of removal within 30 days after the first amended complaint was filed. 28 U.S.C. § 1446(b).

B. Discretionary Remand

As noted, our court of appeals has observed time and again that it is obliged to exercise caution in the removal setting:

> We have noted our obligation "to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated" by it. Maryland Stadium Auth. v. Ellerbe Becket Inc., 407 F.3d 255, 260 (4th Cir. 2005) (quoting Mulcahey, 29 F.3d at 151). . . . Consistent with these principles, we have recognized that state law complaints usually must stay in state court when they assert what appear to be state law claims. See, e.g., Harless v. CSX Hotels, Inc., 389 F.3d 444, 450 (4th Cir.2004); King, 337 F.3d at 424; Darcangelo v. Verizon Communications, Inc., 292 F.3d 181, 186 (4th Cir. 2002); Cook v. Georgetown Steel Corp., 770 F.2d 1272, 1274 (4th Cir. 1985).

Lontz v. Tharp, 413 F.3d 435, 440 (4th Cir. 2005).

Because plaintiff had "substantive and meritorious" and good faith reasons to file her third amended complaint other than to defeat federal jurisdiction, the decision to remand is within the court's discretion. Harless, 389 F.3d at 448. The decision whether to exercise jurisdiction over state claims invokes considerations of judicial economy, convenience and fairness to litigants. Id. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring them a surer-footed reading of applicable law." Id. (quoting United Mine Workers of America v. Gibbs, 383 U.S. 715, 726-27 (1966).

The considerations in Harless weigh in favor of granting plaintiff's motion for remand. While defendants have filed a motion to dismiss plaintiff's third amended complaint

that was subsequently responded and replied to, the case is still in its infancy. As plaintiff's claims no longer implicate SLUSA, and the case involves matters of specific state interest (namely, public employees' retirement accounts) and a state agency party, the interests of comity, convenience and fairness to parties and the absence of underlying federal policy favor remand.

Inasmuch as the only federal issues have been eliminated and inasmuch further as the remaining state law claims are not related to any issues of federal policy, the court declines to exercise jurisdiction over the remaining state law claims.

It is, accordingly, ORDERED that plaintiff's motion to remand be, and it hereby is, granted. It is further ORDERED that this action be, and it hereby is, remanded to the Circuit Court of Kanawha County.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record and any unrepresented parties.

DATED: January 20, 2010

John T. Copenhaver, Jr.
United States District Judge